No. 92-8841

In the Supreme Court of the United States

OCTOBER TERM, 1993

KITRICH POWELL, PETITIONER

v.

STATE OF NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth Amendment generally requires a judicial determination of probable cause within 48 hours of a warrantless arrest, required suppression of a statement made by petitioner more than 48 hours after his arrest.

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INTEREST OF THE UNITED STATES

This Court held in *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), that the Fourth Amendment generally requires a judicial determination of probable cause within 48 hours of a warrantless arrest. The issue in this case is whether custodial statements voluntarily made by a suspect after his warrantless arrest must be suppressed if he does not receive a judicial determination of probable cause within 48 hours. The Court's analysis and resolution of that question is likely to affect the admissibility of evidence offered in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

1. On Friday, November 3, 1989, at approximately noon, petitioner brought four-year-old Melea Allen to the University Medical Center in Las Vegas, Nevada. Petitioner told the attending nurse that he was the child's father, that he had been playing with her the previous evening, and that she had accidentally fallen and hit her head on the floor while he was slipping her over his shoulder. Melea, who was not breathing, was comatose and exhibited a number of bruises in different stages of healing, together with a deep laceration in her chin. The nurse suspected that Melea had been abused, and she accordingly telephoned the Las Vegas Police Department to report the incident. J.A. 2-4; 18 Record on Appeal (ROA) 3146-3154.

At approximately 12:30 p.m., Detective Alfred Leavitt arrived at the hospital to investigate the nurse's report. He first observed Melea in the emergency room and then found petitioner, who was in an adjoining waiting room. Petitioner agreed to give a tape-recorded statement to Leavitt. Asked whether he knew how Melea had been injured, petitioner responded affirmatively. He said, "I was playing with her and I lifted her up over my shoulder and she fell backwards and hit her head." He told Leavitt that the fall had occurred at approximately 12:30 p.m. on the previous day, and that Melea had complained after the fall that her neck hurt. Petitioner also stated that Melea's head was bruised by the fall, and that he did not seek any medical help until he found her, unconscious, on the bathroom floor a day later. He admitted that he punished Melea by spanking her on the buttocks when she wet her pants, but he denied

ever hitting her in the head or otherwise intentionally causing her any injury. The interview lasted approximately 10 minutes. J.A. 5; 20 ROA 3606-3652.

Petitioner was arrested later that day at approximately 3:00 p.m. He was charged with the offense of child abuse with substantial bodily harm. One of the arresting officers then completed a "Temporary Custody Record/Declaration of Arrest" form used by the Las Vegas Police Department. In that form, which was apparently completed within an hour of petitioner's arrest,[1] the officer set forth under penalties of perjury the essential facts of the child abuse crime as related by hospital personnel. At the conclusion of the factual recitation, the officer "pray[ed] that a finding be made by a magistrate that probable cause exists to hold [petitioner] for [a] preliminary hearing." A magistrate subsequently signed the form, indicating that he found probable cause to hold petitioner for the child abuse offense. 1 ROA 11. The Nevada Supreme Court found that the magistrate made that finding on November 7, 1989. J.A. 5.

On November 7, petitioner was interviewed by two Las Vegas police officers at the Clark County Detention Center. After being advised of his *Miranda* rights, he agreed to waive them and to give a recorded statement. In that statement, petitioner explained that he was not Melea's father, and that he had shared various abodes with Melea's mother and her three chil-

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[1] A date stamp on the form lists the time as 3:42 p.m. on Friday, November 3, 1989. 1 ROA 11. Although the Nevada courts did not find it necessary to determine precisely when the form was prepared, petitioner agrees (Br. 6) that from the date stamp it appears that the form was completed by 3:42 p.m. on the date of petitioner's arrest.

dren since meeting them at a Salvation Army shelter in September 1989. Petitioner also repeated his claim that Melea's head had been injured when she slipped off his shoulder, and he attempted to provide exculpatory explanations for her other injuries. J.A. 5, 7; 20 ROA 3615-3685.[2]

2. Melea died on November 8, 1989. J.A. 4. At petitioner's trial for her murder, the State introduced transcripts of his two recorded statements; petitioner objected to their admission solely on state evidentiary grounds. 20 ROA 3610-3622, 3628-3685. In addition, the State presented testimony from Melea's mother and others who were familiar with the family. That testimony established that during the pertinent period petitioner had sole custody of Melea during the daytime, while Melea's mother worked and her two older children were at school, and that Melea seemed to suffer numerous injuries while in petitioner's care. 17 ROA 3058-3060, 3066-3067, 3081-3084; 20 ROA 3482-3491, 3592-3595. The two older children recounted petitioner's abusive conduct toward them and toward Melea, describing how petitioner would shake Melea violently, squeeze her belly until she cried, and sit on her chest as she screamed in pain. 18 ROA

[2] When the officers asked petitioner about the injuries they had observed while visiting Melea in the emergency room, he explained that he had spanked her a few times on the buttocks for wetting her pants, and he admitted that he had once grabbed her by the cheeks and slapped her near the right eye in order to discipline her. Petitioner claimed, however, that Melea lacerated her chin when she slipped and fell in the bathtub, and that she sustained the bruises over each eye when she attempted to walk, and fell, immediately after he dropped her from his shoulder on November 2, 1989. Petitioner denied knowing how Melea sustained bruises to her neck, chest, and shoulder. 20 ROA 3671-3678.

3180-3196, 3229-3230; 19 ROA 3343-3356.[3] Finally, three forensic pathologists explained that the severe cumulative injuries suffered by Melea—a fractured spine, brain swelling and hemorrhaging, and a deep and purple bruising of the buttocks—could have occurred only through repetitive abuse. 16 ROA 2869-2978; 17 ROA 2991, 3003-3012; 21 ROA 3716-3760, 3835-3841; 22 ROA 3874-3882.[4] The jury found petitioner guilty.

3. The Supreme Court of Nevada affirmed. J.A. 2-21. On appeal, petitioner argued, apparently for the first time, that suppression of his two statements was required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and by a Nevada statute mandating that all persons arrested with or without a warrant be taken without unnecessary delay to a committing magistrate for a first appearance. See Nev. Rev. Stat. § 171.178 (1991). That statute provides that failure to present an arrestee "within 72 hours after arrest,

[3] Melea's sister, 14-year-old Melinda, also testified that petitioner telephoned her numerous times while he was awaiting trial. Petitioner initially sought to persuade Melinda to write letters exonerating him of any culpability in Melea's death. After the trial court issued an order barring him from calling Melinda, petitioner called her again, apparently to threaten her; during that call, petitioner told Melinda, "to tell you the truth I did kill your sister. Don't worry, you're next." 19 ROA 3380-3389.

[4] The medical experts agreed that a fall from an adult's shoulder to a hard floor would not have enough force to cause the type of severe head trauma exhibited by Melea. 16 ROA 2957-2966; 21 ROA 3839-3841; 22 ROA 3874-3882. One of the pathologists could compare Melea's head injuries to only one other case in his experience; in that case, a teenager had been propelled onto a concrete surface from a pickup truck traveling 45 miles per hour. 22 ROA 3875-3876.

excluding nonjudicial days" authorizes the magistrate to release the arrestee if the magistrate finds that the delay was unnecessary. Petitioner asserted on appeal that his first appearance occurred on November 13, 1989, more than 72 hours after his arrest.[5]

The court rejected the *Miranda* contentions, explaining that petitioner's first statement was not custodial, while his second one was made after he was advised of, and voluntarily waived, his *Miranda* rights. J.A. 4-8. With respect to petitioner's claim under the State's "prompt presentment" statute, the court noted that the purpose of that statute is to ensure that arrestees are advised of their Fifth Amendment rights. In light of that purpose, the court held, petitioner's waiver of his *Miranda* rights before making his November 7 statement also waived his rights under the statute. *Ibid.*

While discussing the prompt presentment statute, the court adverted to this Court's recent decision in *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth Amendment requires a judicial determination of probable cause within 48 hours of a warrantless arrest, unless a *bona fide* emergency or other extraordinary circumstance caused a longer delay. The Nevada court concluded that *McLaughlin* rendered the state statute "unconstitutional insofar [as] it permits an initial appearance up to seventy-two hours after arrest and instructs that nonjudicial days be excluded from the calculation of those hours." J.A. 6. The court took the position, however, that "the forty-eight hour requirement mandated by *McLaughlin* does not apply to the case at hand," because "[w]hen a case announces a new rule of law, the application of the rule is prospective unless it is a rule of constitutional law; and then it is only applied retroactively under certain circumstances." J.A. 6 n.1. Because of what the court deemed to be "the monumental negative impact which retroactive application would have on the administration of justice in Nevada," the court concluded that "the new rule announced in *McLaughlin* would not apply retroactively." The court observed that if *McLaughlin* were to be applied retroactively, "untold numbers of prisoners would be set free because they were not brought before a magistrate within forty-eight hours." *Ibid.*

[5] Petitioner apparently relied on the fact that the docket sheet for the case reflects an "initial arraignment" on November 13, 1989, after a formal complaint was filed in the case on November 8, 1989. See 1 ROA 4-5.

SUMMARY OF ARGUMENT

This Court held in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), that the Fourth Amendment requires a prompt judicial determination of probable cause following a warrantless arrest. In *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), the Court held that "prompt" generally means within 48 hours, and that absent extraordinary circumstances a longer delay presumptively violates the Fourth Amendment. Petitioner's argument in this Court is that the Nevada courts erred in failing "to apply *McLaughlin*" to him. We agree with petitioner that the Supreme Court of Nevada was wrong to say that *McLaughlin* is not retroactive as to convictions that have not yet become final. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). That error, however, does not help petitioner.

A. This Court has never held that a custodial statement obtained in the absence of a prompt proba-

ble cause determination is a suppressible "fruit" of that violation of the Fourth Amendment. The Court has applied the fruit-of-the-poisonous-tree doctrine when, as in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the suspect who confesses was originally arrested without any probable cause, so that the arrest was unlawful *ab initio*. This case differs significantly from that model, however, because petitioner does not claim that he was arrested and held without probable cause. He claims only that the judicial officer was late in affirming the lawfulness of his arrest.

Because the judicial officer ultimately found probable cause based on information that was collected and recorded by the police immediately after petitioner's arrest, the timing of the finding of probable cause did not in any way affect petitioner's custody. Put another way, nothing would have happened differently in this case if the magistrate had read and approved the arresting officer's form on Friday, November 3, instead of doing so on Tuesday, November 7. Petitioner's custody was therefore not the product of the delay in the magistrate's probable cause determination. For that reason, petitioner's November 7 statement cannot be said to be the "fruit" of the violation of petitioner's Fourth Amendment rights, and the statement was therefore properly admitted into evidence.

B. Even if petitioner's statement could be considered the fruit of a Fourth Amendment violation, suppression of the statement still would not be required. In *Illinois* v. *Krull*, 480 U.S. 340 (1987), this Court held that the exclusionary rule does not apply to evidence obtained by police who act in objectively reasonable reliance upon a statute that is later found to violate the Fourth Amendment. In this case, a state

statute provided a safe harbor of three days, excluding weekends, for presenting an arrestee for his initial appearance. *Gerstein* emphasized that the States retained some discretion to delay the probable cause determination required by the Fourth Amendment so as to consolidate it with their existing first appearance proceedings, and it "indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Schall* v. *Martin*, 467 U.S. 253, 277 n.28 (1984). Reliance by state officers on the times set forth in the first appearance statute was therefore objectively reasonable, and the Friday-to-Tuesday delay that occurred here should not lead to suppression of the November 7 statement that was obtained from petitioner.

ARGUMENT

PETITIONER'S STATEMENT TO THE POLICE SHOULD NOT BE EXCLUDED FROM EVIDENCE

Petitioner presents the question whether this Court's decision in *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), should be applied to a case that was pending on direct appeal at the time *McLaughlin* was decided. The answer to that question is clearly yes. This Court held in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), that a constitutional decision of this Court will be applied to all cases that are not yet final at the time the decision is rendered. Petitioner's conviction was not final at the time *McLaughlin* was decided; he is therefore entitled to the benefit of that decision.[6]

While the Nevada Supreme Court was mistaken in characterizing *McLaughlin* as nonretroactive, that does not mean that the judgment below was in error. The judgment in this case turns on whether petitioner's statement to the police on November 7, 1989,

[6] The state court's decision that *McLaughlin* should not be applied to all pending cases appears to have been based, at least in part, on a misapprehension as to the consequences of such a ruling. There is no reason to assume, as did the state court, that an unlawful delay in finding probable cause would require that large numbers of convicted defendants "be set free because they were not brought before a magistrate within forty-eight hours." J.A. 6 n.1. Even if the defendants' pretrial custody was unlawful, that would not require that their subsequent convictions be vacated. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975). They would be entitled to relief only if the unlawful custody resulted in the obtaining and admission of prejudicial evidence that the State otherwise would not have obtained, and only if exclusionary rule principles required that evidence to be suppressed.

should have been excluded from evidence. In our view, there are two reasons—quite apart from the retroactivity of *McLaughlin*—that the statement was properly admitted: (1) the statement was not the fruit of the Fourth Amendment violation; and (2) even if it was, the state officials were entitled to rely on a presumptively valid state statute in making the probable cause determination, and thus the exclusionary rule should not be invoked to suppress petitioner's statement.

A. The Failure To Make A Probable Cause Finding Within 48 Hours Of A Defendant's Arrest Does Not Require Suppression Of His Statements If His Arrest Was Supported By Probable Cause

1. In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court considered a class action challenge to Florida procedures under which criminal defendants charged by a prosecutor's information might be detained for extended periods—often 30 days or more—without any judicial determination of probable cause. See *id.* at 106. The Court held the Florida system unconstitutional on the ground that the Fourth Amendment requires a "prompt" determination of probable cause following a warrantless arrest as a condition to "any significant pretrial restraint of liberty." *Id.* at 125.

The Court in *Gerstein* made clear that the Fourth Amendment does not require that the determination of probable cause be made in a formal, adversarial proceeding where the defendant is accorded the right to counsel and the right to introduce evidence or confront witnesses against him. After a warrantless arrest, the judicial officer is simply required to make the same judgment, under similar procedures, that he would make in deciding whether to authorize an ar-

rest warrant; as the Court noted, 420 U.S. at 120, probable cause in that context "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony."[7] Recognizing that "state systems of criminal procedure vary widely," the Court then left it to the States to decide how best to integrate the probable cause determination into their individual systems of pretrial procedures. *Id.* at 123-124.

With respect to the timing issue, *Gerstein* "did not * * * mandate a specific timetable" for the probable cause determination required by the Fourth Amendment, *Schall* v. *Martin*, 467 U.S. 253, 275 (1984), although the Court cited with approval a model code authorizing the probable cause determination to be made within two "court days" of the arrest, 420 U.S. at 124 n.25.[8] The Court shed some light

[7] The Nevada Supreme Court appears to have assumed that *McLaughlin* required that the defendant be accorded a personal appearance before a judicial officer within 48 hours, see J.A. 5-6 & n.1, when in fact it required only that a judicial determination of probable cause be made during that period. Under *Gerstein*, that determination could be made during the arrestee's initial appearance before the magistrate, but it could also be made on a written submission outside the arrestee's presence. While the right to a prompt probable cause determination is constitutional, the right to a prompt personal appearance before a magistrate is entirely a matter of state law, analogous to the nonconstitutional right to an initial appearance in the federal system under Fed. R. Crim. P. 5(a).

[8] The Court referred to a draft of the American Law Institute's Model Code of Pre-Arraignment Procedure. That draft provided that a person arrested without a warrant should be accorded a first appearance before a judicial officer within 24 hours of arrest; the magistrate would be authorized but not required to make a determination of probable cause at that

on the range of acceptable procedures in *Schall* v. *Martin*, *supra*, which involved a challenge to provisions of New York law authorizing preventive detention of accused juvenile delinquents. The New York law at issue provided that juveniles who were not released to the custody of their parents generally were entitled to an initial appearance before the Family Court immediately after arrest. See *Schall*, 467 U.S. at 257-258 n.5. The Family Court judge, however, was not required to determine probable cause at that appearance, and in fact probable cause was usually determined at a hearing conducted within three days of that initial appearance. *Id.* at 276-277 & n.27. The Court upheld those procedures as constitutionally adequate, noting that "*Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Id.* at 277 n.28.

The Court's most recent pronouncement on *Gerstein*'s requirement of promptness came in *County of Riverside* v. *McLaughlin*, *supra*. In *McLaughlin*, the Court reviewed an injunction that ordered two California counties to provide suspects with a probable cause determination within 36 hours of their warrantless arrests. The Court noted that "[g]iven that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable," and therefore "the Fourth Amendment permits a reasonable postpone-

time. See Model Code of Pre-Arraignment Procedure § 310.1 (6) (Tent. Draft No. 5, 1972 and Tent. Draft 5A, 1973). In most cases, probable cause would be determined at an "adjourned session" to be held within two "court days" of the first appearance—*i.e.*, within five days of the arrest in the case of an intervening three-day weekend. *Id.* § 310.2(1).

ment of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system." *McLaughlin*, 111 S. Ct. at 1669.

The *McLaughlin* Court was concerned, however, that *Gerstein*'s standard of promptness was too vague to provide sufficient guidance, and had led instead "to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations." 111 S. Ct. at 1669. In view of the importance of providing "some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds," the Court adopted a 48-hour guideline to ensure that "a jurisdiction that provides judicial determinations of probable cause within [that time period] will, as a general matter, comply with the promptness requirement of *Gerstein*," and thus "will be immune from systemic challenges." *Id.* at 1670. Where an arrestee does not receive a probable cause determination within 48 hours, however, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Ibid.*

2. In light of *McLaughlin*, we assume for purposes of proceedings in this Court that petitioner's Fourth Amendment rights were violated by the Friday-to-Tuesday delay that occurred here.[9] It does not follow, however, that the delay requires suppression of the statement given by petitioner on Tuesday. To be subject to suppression, evidence must be considered the direct product (or "fruit") of the particular government conduct that invaded the Fourth Amendment.

That principle follows from a doctrine that the Court first recognized in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). In *Silverthorne*, the government had discovered documents in the course of an unlawful search and seizure and then sought to use its knowledge of the existence of the documents to compel the defendants to produce them under a subpoena. Speaking through Justice Holmes, the Court rejected that effort, explaining that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392. Justice Holmes went on to note, however, that facts that have been unlawfully discovered do not necessarily "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others." *Ibid.*

From Justice Holmes's early suggestion in *Silverthorne*, the Court has developed the modern Fourth

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[9] There are two open questions, not addressed below, that could defeat petitioner's claim that his Fourth Amendment rights were violated in this case. First, it is not clear from the record or from the state court's opinion that petitioner's November 7 statement was given prior to the magistrate's determination of probable cause on the same day. If the statement was made after the probable cause determination (and that may well have been the case, since the statement was made late in the afternoon of November 7), suppression of the statement would clearly be improper. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972). Second, because petitioner did not raise the Fourth Amendment issue in the trial court, the record does not reflect whether the State could meet its burden under *McLaughlin* to demonstrate a valid reason for delaying the judicial determination of probable cause more than 48 hours after petitioner's arrest.

Amendment doctrines that prohibit the suppression of evidence that is not the "fruit" of a constitutional violation, *i.e.*, evidence that was, or inevitably would have been, obtained irrespective of the violation.[10] As the Court recently explained:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray v. *United States*, 487 U.S. 533, 537 (1988) (quoting *Nix* v. *Williams*, 467 U.S. 431, 443 (1984)). In light of that principle, the Court has repeatedly

[10] The Court has used different terms to describe the absence of a sufficient causal connection between the violation and the obtaining of evidence: where the evidence was obtained as a result of investigative steps unaffected by the violation, the Court has characterized the evidence as the product of an "independent source." Where it is clear that the evidence would have been obtained regardless of the violation, the Court has referred to the evidence as the product of "inevitable discovery." See *Murray* v. *United States*, 487 U.S. 533, 537-539 (1988). And where the Court has reached the more general conclusion that the violation did not lead, in a sufficiently concrete way, to the obtaining of the evidence, the Court has referred to the evidence as not being the "fruit" of the illegality. The three doctrines all express the same underlying point: that absent a sufficient casual connection between the violation and the evidence in question, suppression is inappropriate.

held that suppression is not appropriate when the Fourth Amendment violation does not place the government in any better position than it would have occupied had the Constitution not been violated at all. See *Murray* v. *United States*, 487 U.S. at 541.

The Court's application of that principle in three recent cases is instructive here. In *United States* v. *Crews*, 445 U.S. 463 (1980), a robbery victim identified her assailant after he was arrested without probable cause. The Court assumed that the post-arrest identification should be suppressed, but it refused to suppress the victim's later in-court identification of her assailant as the fruit of the defendant's illegal arrest. The Court noted that the victim came forward before the arrest occurred, and therefore her presence at trial was not traceable to any Fourth Amendment violation. In light of the well-settled rule that even an arrest without any probable cause never entitles a defendant to "suppression" of his body from the trial, the Court unanimously concluded that the in-court identification could not properly be considered a "fruit" of the unlawful arrest. *Id.* at 472-473. As Justice Brennan put the point, "the Fourth Amendment violation * * * yielded nothing of evidentiary value that the police did not already have in their grasp." *Id.* at 475.

More recently, in *New York* v. *Harris*, 495 U.S. 14 (1990), the Court relied on *Crews* to reach a similar result. The defendant in *Harris* was arrested in his home. The arresting officers had probable cause to arrest him, but they did not comply with *Payton* v. *New York*, 445 U.S. 573 (1980), which forbids a suspect's arrest in his home other than pursuant to a warrant. After being taken from his home, the defendant made an incriminating statement in the

station house. The Court held that the station house statement was not a fruit of the *Payton* violation. The Court noted that Harris was not "unlawfully in custody" while he was detained at the station house, because "the officers had probable cause to arrest [him] for a crime." 495 U.S. at 18. Because Harris's statement was not "the fruit of having been arrested in the home rather than someplace else," it did not have to be excluded from evidence. *Id.* at 19.

Finally, in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), the Court rejected the claim that a failure to provide a suspect with a detention hearing within the time limits prescribed by the Bail Reform Act of 1984 entitled him to immunity from pretrial detention. The Court noted that the case was "similar to *New York* v. *Harris*, * * * in which we held that an unlawful arrest does not require a release and rearrest to validate custody, where probable cause exists." 495 U.S. at 722. In light of *Harris*, the Court concluded that "a person does not become immune from detention because of a timing violation." *Ibid.* Since the suspect would have been denied bail if the applicable time limits had been observed (as shown by the subsequent, if untimely, finding that he was a risk of flight and a danger to the community), "the noncompliance with the timing requirement had no substantial influence on the outcome of the proceeding" and no relief was warranted as a result of the violation. *Ibid.*

The analysis in these cases answers petitioner's claim here. Petitioner's arrest was based upon probable cause, as the magistrate found on November 7, 1989. His sole Fourth Amendment claim under *Gerstein* and *McLaughlin* concerns not the existence of probable cause or the validity of the magistrate's finding of probable cause, but simply the timing of the probable cause determination. Yet by analogy to Crews' unlawful arrest, the improper location of Harris's arrest, and the improper delay in Montalvo-Murillo's detention hearing, the delay in petitioner's probable cause determination did not affect the ability of the police to obtain a statement from petitioner on November 7.

To be sure, the November 7 statement was possible, at least in part, because petitioner was in custody at that time. But his custody was the product of probable cause, not the product of the delay in the magistrate's probable cause finding. The timing of the probable cause determination would have affected petitioner's custody only if there had been no probable cause to hold him.[11] Because there was probable cause to hold petitioner from the outset, and because the magistrate made the same probable cause finding on Tuesday that he would have made if he had acted two days earlier, none of the circumstances that could have affected petitioner's statement would have been changed if the probable cause determination had been accelerated, in anticipation of this Court's decision in *McLaughlin*.

This case is a particularly compelling one for applying Fourth Amendment "fruits" analysis to deny suppression. Within an hour of petitioner's arrest, the police had completed all the steps they needed to submit the probable cause issue to the magistrate for

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[11] No claim has been made, or could be, that petitioner's statement was the product of the failure to release him on bail before November 7. Petitioner was not released on bail at any point prior to trial, and there is no reason to believe that he would have been released if a bail hearing had been held immediately after his arrest.

decision. By that time, they had completed the form that contained the information submitted to the magistrate for a determination of probable cause. The magistrate, moreover, made the probable cause determination based on the information set forth on that form. Thus, this is not a case in which the police took advantage of a delay in the timing of the probable cause determination to buttress what had previously been an inadequate showing of probable cause.[12]

Petitioner's statement therefore was not a fruit of the failure to make a timely probable cause determination. Instead, it was a consequence of the proper custody in which petitioner was held as a result of the existence of probable cause. Suppression of petitioner's November 7 statement would put the prosecution in a worse position than if there had been no Fourth Amendment violation at all. To suppress petitioner's statement under these circumstances would be inconsistent with this Court's Fourth Amendment jurisprudence.

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[12] In that respect, this case is analogous to cases in which the lower courts, applying this Court's precedents, have refused to suppress evidence obtained during a warrantless entry, where the evidence in question inevitably would have been discovered pursuant to a valid warrant in any event. See, *e.g.*, *United States* v. *Herrold*, 962 F.2d 1131, 1140-1144 (3d Cir.), cert. denied, 113 S. Ct. 421 (1992); *United States* v. *Perrone*, 936 F.2d 1403, 1413 (2d Cir. 1991); *United States* v. *Mithun*, 933 F.2d 631, 635-636 (8th Cir.), cert. denied, 112 S. Ct. 201 (1991); *United States* v. *Register*, 931 F.2d 308, 311 (5th Cir. 1991); *United States* v. *Curtis*, 931 F.2d 1011, 1013-1014 (4th Cir.), cert. denied, 112 S. Ct. 230 (1991); *United States* v. *Halliman*, 923 F.2d 873, 880-881 (D.C. Cir. 1991) (Thomas, J.). See also *State* v. *Follinus*, 855 P.2d 863, 865 (Idaho 1993).

3. Petitioner contends (Br. 8-9) that the availability of suppression for his custodial statements must be assessed solely under the principles of "attenuation." Attenuation is another branch of the rule that evidence should not be suppressed unless there is a direct causal link between the Fourth Amendment violation and the challenged evidence, but "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.' " *New York* v. *Harris*, 495 U.S. at 19. In this case, petitioner's claim fails *before* considering any question of taint, because "it is clear * * * that not even the threshold 'but for' requirement was met in this case." *Segura* v. *United States*, 468 U.S. 796, 815 (1984). In any event, however, petitioner's claim fails even if the case is analyzed as presenting a question of attenuation.

As applied to statements that result from a Fourth Amendment violation, the attenuation principle was first expounded by the Court in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In that case, the Court concluded that inculpatory statements by defendant Toy, which he made shortly after he was arrested without probable cause, were the "direct result" of that arrest, and therefore ordered their suppression. The Court explained that in the circumstances it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 486. The Court reached a different conclusion, however, with respect to the confession made by defendant Wong Sun several days after his illegal arrest. "On the evidence that Wong Sun had been released on his

own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement," the Court held that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Id.* at 491 (quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939)).

The Court again applied the attenuation principle in *Brown* v. *Illinois*, 422 U.S. 590 (1975), which involved a defendant who had made incriminating statements several hours after he was arrested without probable cause. The Court concluded that the statements were not "sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Id* at 603. In reaching that conclusion, the Court refined the *Wong Sun* analysis by identifying a number of factors relevant to determining whether verbal evidence is sufficiently attenuated to purge the primary taint (*id.* at 603-604 (footnotes and citation omitted)):

> No single factor is dispositive. * * * The *Miranda* warnings are an important factor[.] * * * The temporal proximity of the arrest and the confession, the presence of intervening circumstances * * *, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

In concluding that the taint was not purged in *Brown*, the Court noted that, while *Miranda* warnings had been given, the statements had been made within hours of the arrest, with "no intervening event of significance whatsoever." *Id.* at 604. More importantly, "[t]he illegality * * * had a quality of

purposefulness. The impropriety of the arrest was obvious," since "[t]he arrest, both in design and in execution, was investigatory." *Id.* at 605. See also *Dunaway* v. *New York*, 442 U.S. 200, 218 (1979) (reversal required where situation was "virtually a replica of the situation in *Brown*" in that the defendant "was seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance"); *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982) (same).

The factors identified by this Court in *Brown* establish that any taint that flowed from the *McLaughlin* violation in this case was insufficient to justify the exclusion of petitioner's November 7 statement. This is not a case in which a suspect "was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event." *Taylor* v. *Alabama*, 457 U.S. at 691. On the contrary, the officer had probable cause to arrest petitioner, and he acted within an hour of the arrest to complete the form necessary to secure a judicial determination of probable cause. The failure to obtain prompt judicial affirmance of the existence of probable cause in this case is worlds apart from the unlawful investigative arrests that were at issue in *Brown*, *Dunaway*, and *Taylor*.

Nor does the record indicate that petitioner's arrest or the conditions of his confinement were violent or otherwise designed to "cause surprise, fright, and confusion." *Brown* v. *Illinois*, 422 U.S. at 605. Almost four days elapsed between petitioner's arrest and his November 7 statement, and that statement was preceded by *Miranda* warnings as to his rights to silence and counsel, which he waived voluntarily

and without coercion.[13] As the Court has recognized, those warnings and their waiver, while not usually dispositive, "are an important factor * * * in determining whether the confession [was] obtained by exploitation of" the Fourth Amendment violation. *Brown* v. *Illinois*, 422 U.S. at 603; see also *id.* at 612 (Powell, J., concurring in part); *Taylor* v. *Alabama*, 457 U.S. 699-700 (O'Connor, J., dissenting). See also *United States* v. *Ceccolini*, 435 U.S. 268, 276-277 (1978).

In addition, petitioner indicated his willingness to speak to law enforcement authorities about his involvement in the events leading to Melea's death on November 3, 1989, before he was arrested. Thus, there is little reason to believe that petitioner's arrest, his detention, or the timing of the probable cause determination, alone or in combination, had any influence on his decision to waive his rights and make a voluntary statement on Tuesday, November 7. Petitioner did nothing on Tuesday that he had not already indicated he was willing to do before his arrest on Friday. In fact, his November 7 statement covered much the same ground, albeit in more detail, that had already been covered in his November 3

[13] Petitioner contends (Br. 10) that the length of detention should be analyzed differently in the case of *McLaughlin* violations than in cases like *Brown*, because the concern is not with the impact of the arrest itself, which can be said to dissipate over time, but with the impact of a prolonged detention, which can be said to increase over time. That difference, in petitioner's view, warrants the conclusion that the passage of time *aggravates* the taint of a *McLaughlin* violation. That submission overlooks the fact that in cases like *Brown* the arrest and the ensuing custody without probable cause are *both* illegal, and there surely can be no claim that imprisonment without probable cause becomes *less* grave the longer the suspect is held in custody.

statement. Under these circumstances, petitioner's voluntary statement on November 7, even if it could be said to be a fruit of the *McLaughlin* violation in some broad causal sense, was sufficiently independent of that illegality to be admissible.

B. Suppression Is Unavailable In This Case Because State Officers Could Reasonably Rely On The 72-Hour Provision Of State Law

Even if petitioner's November 7 statement is regarded as the unattenuated fruit of the delay in the magistrate's probable cause finding, the statement still should not be excluded, because the state officials were entitled to act in reliance on a presumptively valid state statute when they obtained a probable cause determination within three court days of petitioner's arrest, rather than within the 48-hour period later required by this Court in *McLaughlin*.

In *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987), this Court held that the exclusionary rule does not require the suppression of evidence obtained by police who act in objectively reasonable reliance on a statute that is subsequently found to violate the Fourth Amendment. The Court explained that, unless a statute is obviously unconstitutional, police officers cannot be expected to question the judgment of the legislature that passed the law. Nor can the exclusionary rule, whose purpose is to deter police misconduct, be expected to have a significant deterrent effect on the enactment of unconstitutional statutes by legislatures. In light of the high social costs exacted by suppression, the Court concluded that a search that was authorized by a statute later found unconstitutional could not give rise to suppression. See also *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979).

Those principles preclude the suppression of petitioner's November 7 statement. *Gerstein* allowed States to delay the probable cause determination required by the Fourth Amendment so as to consolidate it with their existing first appearance proceedings, and *Schall* v. *Martin* interpreted *Gerstein* to "indicate[] approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." 467 U.S. at 277 n.28. It was therefore reasonable for Nevada law enforcement officers to look to the limit provided for a first appearance by Nevada law—72 hours, excluding weekends—to guide their conduct with respect to the Fourth Amendment prior to this Court's decision in *McLaughlin*. See, *e.g.*, *Williams* v. *Ward*, 845 F.2d 374, 388-389 (2d Cir. 1988) (finding constitutional, in light of *Gerstein* and *Schall*, 72-hour detentions prior to probable cause determinations in New York City), cert. denied, 488 U.S. 1020 (1989).

Petitioner offers two arguments (Br. 11 nn. 7-8) to avoid the application of *Krull*. First, he claims that state officials could not reasonably have relied on the 72-hour provision, because the state statute prohibits unnecessary delay, and the delay in this case was not shown to be necessary. Second, he argues that a claim of good faith reliance was never advanced below, and that this case would therefore be "a wholly inappropriate vehicle for determining that issue."

To begin with, those arguments overlook the fact that *Gerstein* and *Schall* warranted state authorities in the belief that a delay in the probable cause determination to consolidate it with a first appearance would *not* be construed as impermissible. What is more, petitioner bears sole responsibility for the fact

that the record does not reflect the reasons for the delay that occurred here. He never raised the Fourth Amendment claim in the trial court or the Supreme Court of Nevada, so it is no surprise that the State failed to make a record as to the reasons for the timing of the probable cause determination.

Under the principles set forth in *Krull*, suppression would be inappropriate in this case, because Nevada officials could believe in good faith—two years before *McLaughlin* was decided—that the Friday-to-Tuesday delay that occurred here comported with the applicable Nevada statute, and that the statute was consistent with the Fourth Amendment requirements announced by this Court in *Gerstein* and *Schall*. To suppress here would punish state officials for adhering to a presumptively valid state statute and, as in *Krull*, would not serve the deterrent purposes underlying the Fourth Amendment exclusionary rule.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

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